



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2004

Mr. Nelson Downing
Director, Smith County Juvenile Services
Tyler-Smith County Juvenile Attention Center
P.O. Box 1257
Tyler, Texas 75710

OR2004-4732

Dear Mr. Downing:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 203179.

The Smith County Juvenile Services Office (the "county") received two requests from the same requestor for information pertaining to a specified investigation and personnel file for a previous county employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted sample of information.¹

Initially, we note that Exhibit M contains a grand jury record. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See Open Records Decision*

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988).* This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that the information we have marked in Exhibit M is in the custody of the county as agent of the grand jury, such information is in the constructive possession of the grand jury and is therefore not subject to disclosure under the Act. However, to the extent that this information is not in the custody of the county as agent of the grand jury, we will address your claims for this and the remaining submitted documents.

Next, we note that Exhibit R is a court-filed document that is expressly public under section 552.022 of the Government Code and may not be withheld unless confidential under other law. *See* Gov't Code § 552.022(a)(17). You raise section 552.103 as an exception to disclosure of this information. Section 552.103 is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, you may not withhold Exhibit R under section 552.103 of the Government Code. Although you raise no other exceptions to disclosure with regard to Exhibit R, information subject to section 552.022(a)(17) must be withheld if it is excepted from disclosure under section 552.101 of the Government Code. Therefore, we will address this exception with regard to Exhibit R and portions of the remaining submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code §261.201. We note that the submitted documents reflect that the county has reported an alleged abuse to the Texas Juvenile Probation Commission ("TJPC") for

investigation, as required by section 261.405(b) of the Family Code. Further, we note that the documents at issue have been provided to the TJPC. Therefore, we conclude that Exhibits M, N, and R constitute files, reports, records, communications, and working papers used or developed by the county in an investigation made under chapter 261 of the Family Code. You do not inform us that you have adopted a rule that governs the release of this type of information. We therefore assume that no such rule exists. Given this assumption, we conclude that the submitted information in Exhibits M, N, and R is confidential under section 261.201 of the Family Code and must be withheld in its entirety pursuant to section 552.101 of the Government Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

The county argues that Exhibits I through L, O through Q, and S through Z are excepted from disclosure under section 552.103. Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You represent to this office that Exhibits I through L, O through Q, and S through Z are excepted from disclosure under the litigation exception. We understand you to assert that

a criminal case was pending when the county received this request for information. The county does not inform us, however, that it is a party to the pending criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Under such circumstances, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. You have not provided us with such a representation. Accordingly, we conclude that the county may not withhold any portion of Exhibits I through L, O through Q, or S through Z under section 552.103 on the basis of a pending criminal prosecution.

However, you also argue that the county reasonably anticipates civil litigation in this matter. The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). In order to establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

After careful consideration of your arguments and the information at issue, we find, however, that you have not adequately demonstrated, nor do the submitted documents reflect, that civil litigation was reasonably anticipated by the county on the date that it received this request. Accordingly, we conclude that the county may not withhold Exhibits I through L, O through Q, or S through Z under section 552.103 of the Government Code on the basis of any civil litigation that may be anticipated.

You contend that portions of Exhibits C through J are excepted from disclosure under sections 552.101 and 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). This exception is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be excepted from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure by the common-law right to privacy as incorporated by section 552.101 of the Government Code. *See also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Information is protected by the common-law right to privacy when it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Id.* at 685. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Having reviewed Exhibits C through J, we conclude that most of it is of legitimate public interest and thus may not be withheld pursuant to section 552.102 of the Government Code. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We have marked those portions of Exhibits C through J that must be withheld pursuant to sections 552.101 and 552.102 of the Government Code. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007.

You contend that portions of Exhibits C through H are excepted from disclosure under section 552.117(a)(1) of the Government Code. This section excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). You have supplied this office with a copy of the form in which this employee has timely elected to keep his home address and phone number confidential prior to the time the county received this request. We agree that you must withhold the home address and phone number we have marked under

section 552.117(a)(1) of the Government Code for this employee. The remaining personal information must be released.

We note that a social security number not otherwise excepted from disclosure under section 552.117 might nevertheless be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, the county should ensure that it did not obtain or maintain the social security number pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, you argue that a portion of Exhibit D is excepted from disclosure under section 552.130. Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. By its terms, this exception applies only to information pertaining to motor vehicle records issued by agencies of this state. Thus, pursuant to section 552.130, the county must withhold the information we have marked in Exhibit D to the extent it pertains to Texas-issued motor vehicle records.

In summary, to the extent that the information we have marked in Exhibit M is in the custody of the county as agent of the grand jury, it is not subject to disclosure under the Act. To the extent that this information is not in the custody of the county as agent of the grand jury, the county must withhold it pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The county must also withhold Exhibits N and R pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The county must withhold the information we have marked pursuant to sections 552.101 and 552.102 of the Government Code. The county must withhold the home address and phone number we have marked pursuant to section 552.117 of the Government Code. The social security number may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act. The county must withhold the information we have marked in Exhibit D to the extent it pertains to Texas-issued motor vehicle records. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

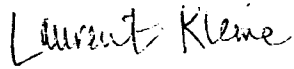
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Lauren E. Kleine".

Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/seg

Ref: ID# 203179

Enc. Submitted documents

c: Mr. Bobby McLean
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(w/o enclosures)